	Case 2:15-cv-09332-SJO-JEM Document 68 #:10!	
1 2 3 4 5 6 7 8 9 10	Richard B. Specter, SBN 114090 Diane L. Ellis, SBN 130628 CORBETT, STEELMAN & SPECTER A Professional Law Corporation 18200 Von Karman Avenue, Suite 900 Irvine, California 92612-1023 Telephone: (949) 553-9266 Facsimile: (949) 553-8454 rspecter@corbsteel.com Attorneys for Plaintiffs LOS ANGELES TURF CLUB, INCORPO LOS ANGELES TURF CLUB II, INC., PACIFIC RACING ASSOCIATION, PACASSOCIATION II, GULFSTREAM PARKASSOCIATION, INC., OREGON RACING MARYLAND JOCKEY CLUB OF BALTI and LAUREL RACING ASSOCIATION, 1	IFIC RACING K RACING G, INC., IMORE CITY, INC.,
12 13	UNITED STATES	DISTRICT COURT
14		CT OF CALIFORNIA
15 16 17 18	LOS ANGELES TURF CLUB, INCORPORATED, a California) Corporation, LOS ANGELES TURF) CLUB II, INC., a California Corporation,) PACIFIC RACING ASSOCIATION, a) California Corporation, PACIFIC)	No.: 2:15-cv-9332 SJO (JEMx) PLAINTIFFS' SEPARATE STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS IN OPPOSITION TO DEFENDANT'S
19	RACING ASSOCIATION II, a California) Corporation, GULFSTREAM PARK	
20	RACING ASSOCIATION, INC., a) Florida Corporation, OREGON RACING,)	[Filed concurrently with Opposition to
21	INC., a Delaware Corporation,) MARYLAND JOCKEY CLUB OF)	Motion for Summary Judgment]
22	BALTIMORE CITY, INC., a Maryland) Corporation, and LAUREL RACING)	Date Filed: December 3, 2015 Discovery Cutoff: March 27, 2017
23 24	ASSOCIATION, INC., a Maryland) Corporation,)	Final Pretrial Conf.: June 19, 2017 Trial Date: June 27, 2017
25	Plaintiffs,)	DATE: April 24, 2017
26	vs.	TIME: 10:00 a.m. CTRM: 10C
27	HORSE RACING LABS, LLC, a	CIMII, IUC
28	Delaware Limited Liability Company, (also known as IMMERSE, LLC), doing	
	PLAINTIFFS' SEPARATE STAT	EMENT OF ADDITIONAL MATERIAL FACTS

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1 2 3 4 5	business as DERBYWARS, and DOES 1) through 10, inclusive,) Defendants.)
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7	Plaintiffs Los Angeles Turf Club, Incorporated, Los Angeles Turf Club II, Inc.,
8	Pacific Racing Association, Pacific Racing Association II, Gulfstream Park Racing
9	Association, Inc., Oregon Racing, Inc., Maryland Jockey Club Of Baltimore City, Inc.,
10	and Laurel Racing Association, Inc. (collectively, "Plaintiffs"), respectfully submit the
11	following Separate Statement of Additional Undisputed Facts in support of their
12	Opposition to Defendant's Motion for Summary Judgment:
13	I. <u>ADDITIONAL UNDISPUTED MATERIAL FACTS</u>
14	The uncontroverted facts listed below as 72 - 135, are also proffered by
15	Plaintiffs in support of their Motion for Partial Summary Judgment. The evidence
16	cited in support of Uncontroverted Facts 72 - 128, was previously submitted to the
17	Court. ($\underline{\text{Docket}}$ Nos. 62 – 62-17). The evidence supporting uncontroverted facts
18	numbers 129 - 135, is filed herewith.
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	-2- PLAINTIFFS' SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S ISSUE IA - THAT PLAINTIFFS' FIRST CAUSE OF ACTION FOR ALLEGED VIOLATION OF THE INTERSTATE

HORSERACING ACT FAILS AS A MATTER OF LAW

UNDISPUTED MATERIAL FACTS	EVIDENCE
 72. Horse Racing Labs, LLC ("HRL") is a Delaware limited liability company, doing business in Louisville, Kentucky. 73. Defendant operates out of an office building in Kentucky. 	Deposition of Mark Midland, attached to the Declaration of Richard B. Specter, (Docket No. 62-4) as Exhibit "A," (Docket No. 62-5) ("Midland Depo."), 16:19-17:11; Answer to First Amended Complaint, (Docket No. 34), ¶ 11. Midland Depo., 16:19-17:11; 161:7-12, Docket No. 62-5.
74. Defendant offers contests in which players from across the country (including players in California, Florida, Maryland and Oregon), pay entry fees interstate (to Kentucky) in order to wager on races run at race tracks, including those operated by Plaintiffs.	Midland Depo., 166:9-167:4; 180:12-181:24, <u>Docket</u> No. 62-5.
75. The first page of Defendant's Derby Wars' website (www.derbywars.com) proclaims: "Horse Racing Handicapping Contests" "Play for free or real money" "Pick a horse in each race" "Over \$20-million paid out in winnings!"	Declaration of Diane L. Ellis ("Ellis Dec."), ¶ 4. <u>Docket</u> No. 62-7.
76. To participate in the contests, a player must first create an account with Defendant and deposit funds to the account.	Midland Depo., 168:4-19, <u>Docket</u> No. 62-5.
77. Defendant maintains players' funds in a bank account consisting only of players' funds, and when the player	Deposition of Michael R. Shutty, attached to the Declaration of Richard B. Specter (<u>Docket</u> No. 62-4), as Exhibit

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1	enters a contest, his account is deducted	"B," (<u>Docket</u> No. 62-6), ("Shutty
2	by the amount of the wager (the "entry fee").	Depo."), 112:16-113:24; Midland Depo., 168:17-23; 327:15-23, <u>Docket</u> No. 62-5.
3	78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
4	wager (the "prize"), his Derby Wars	No. 62-5.
	account is credited with his winnings.	
5	The player can thereafter request a	
6	withdrawal from his account, in which	
7	case a check is sent to him from the	
7	Derby Wars account.	15.11.12.22.22.24.425.24.22
8	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
9	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
	California, Florida, Maryland or Oregon. 80. Defendant touts its contests as	Ellis Dag ¶ 4 Dookst No. 62.7:
10	allowing players to "win real money,"	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7; Midland Depo., 181:22-24, <u>Docket</u> No.
11	and the players do win real money.	62-5.
12	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	that are "head-to-head".	
13	82. In these contests, two players pay an	Midland Depo., 129:11-13, Docket No.
14	entry fee for a fixed prize.	62-5.
15	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
13	players each pay a \$22 entry fee to	
16	compete with each other.	
17	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
	"rake" retained by Defendant.	Docket No. 62-5.
18	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
19	contests with the prize up to \$1,500, with \$799 entry fees.	
20	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	players must select horses in 6 to 10	Dins Dec., 3, Docket 110. 02-7.
21	different races running at various race	
22	tracks, including Plaintiffs' tracks.	
23	87. In the contests, "the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
23	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
24	payouts at actual race tracks", and are	No. 62-5.
25	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
26	including Plaintiffs' tracks.	
27	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6, Docket No. 62-5.
28	89. The player with the biggest bankroll	Midland Depo., 180:12-22, Docket No.
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(the most winnings) at the end of the contest, wins the "prize." 90. Defendant also offers "high stakes" contests for up to \$300,000, with a \$2,200 entry fee. 91. In agreements with third parties, Defendant even refers to its players as "bettors." Perfendant even refers to its players as "bidland Depo., 135:18-136:10, Docket No. 62-5. Perfendant even refers a contest, it is uncertain as to which			
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99. Unlike other sports, horseracing is almost exclusively funded by wagering. 100. The total amount wagered is the "handle." 101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers. 102. The remaining approximately twenty percent is known as the "takeout," the amount initially retained by the race track. 103. The takeout is then divided, Declaration of Scott J. Daruty ("Daruty Dec"), ¶¶ 8, 10, Docket No. 62-3. Daruty Dec, ¶ 10, Docket No. 62-3. Daruty Dec., ¶ 10, Docket No. 62-3.	19		
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100. The total amount wagered is the "handle." 101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers. 102. The remaining approximately twenty percent is known as the "takeout," the amount initially retained by the race track. 103. The takeout is then divided, Daruty Dec., ¶ 10, Docket No. 62-3.	21	1	
101. By law, approximately eighty percent of the handle is returned to the patrons who placed winning wagers. 102. The remaining approximately twenty percent is known as the "takeout," the amount initially retained by the race track. 103. The takeout is then divided, Daruty Dec., ¶ 10, Docket No. 62-3.			Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
percent of the handle is returned to the patrons who placed winning wagers. 102. The remaining approximately twenty percent is known as the "takeout," the amount initially retained by the race track. 103. The takeout is then divided, Daruty Dec., ¶ 10, Docket No. 62-3.	22		
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102. The remaining approximately twenty percent is known as the "takeout," the amount initially retained by the race track. 103. The takeout is then divided, Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.	24	*	
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the amount initially retained by the race track. 103. The takeout is then divided, Daruty Dec., ¶ 10, Docket No. 62-3.	25	· · · · · · · · · · · · · · · · · ·	1. 3. 3 - 1. 1. 1. 1. 1. 1. 1. 1. 1. 1. 1. 1. 1.
103. The takeout is then divided, Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.	26	• • •	
· · · · · · · · · · · · · · · · · · ·	27		
pursuant to contract and law, among the -5-	28	II ·	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	20	pursuant to contract and law, among the -5-	

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1	stakeholders in the form of commissions	
2	paid to the racetracks; purses paid to the	
	owners, trainers and jockeys of the	
3	horses in the race; taxes paid to the state;	
4	and funds dedicated to equine research,	
_	workers' compensation funds, worker	
5	health and welfare, etc., that benefit the	
6	backstretch workers.	
7	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
′	horseracing includes "Win" (picking a	
8	horse to finish first in the race), "Place"	
9	(picking a horse to finish first or second	
	in the race) and "Show" (picking a horse	
10	to finish first, second or third in the race).	Darreta Dar. #11 Darla No. 62.2
11	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	Place or Show is called an exotic wager.	Domuty Dog ¶ 11 Dogket No. 62.2
12	106. Exotic wagers include the "Daily Double" (picking the winning horse in	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
13	two consecutive races), "Exacta"	
14	(picking the first two horses to finish in a	
14	single race in the exact order), "Trifecta"	
15	(picking the first three horses to finish in	
16	a single race in the exact order), "Pick	
10	Three" (picking the winning horse in	
17	three consecutive races), "Pick Four"	
18	(picking the winning horse in four	
	consecutive races), and a "Pick Six"	
19	(picking the winning horse in six	
20	consecutive races.)	
	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
21	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
22	are indeed wagers when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
23	racetrack.	
23	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
24	only took place live (at the actual track	
25	where the race was being run), such that	
23	bettors had to attend the race to place a	
26	wager.	
27	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
28	at locations other than the track where	
I	-6-	I

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1	the race was being run.	
2	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
	which was explicitly intended to	
3	"regulate interstate commerce with	
4	respect to wagering on horseracing." As	
	provided therein, no one "may accept an	
5	interstate off-track wager except as	
6	provided in" the IHA.	
_	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
7	HA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
8		62-6.
	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
9	the industry has experienced much	
10	growth in the area of Advanced Deposit	
11	Wagering ("ADW").	
11	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
12	with a licensed, regulated	
12	online/telephone wagering operator, and	
13	then issues wagering instructions (via	
14	telephone or internet) to that operator to	
15	place a wager on a specific race using	
13	funds in the account.	
16	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
17	winning funds are deposited directly into	
1 /	the customer's account.	
18	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
19	interstate wagers on horseraces by an	
	entity (including an ADW operator),	
20	which has obtained consent from, <i>inter</i>	
21	alia, the host racing association on whose	
	races such wagers are placed, such as	
22	Plaintiffs.	
23	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	host racing association to grant the	
24	required consent only if it receives a	
25	payment of money or other value from	
	the entity accepting the wagers.	
26	117. Defendant has never been licensed	Midland Depo., 406:21-23.
27	as an ADW.	
	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
28	at race tracks in California (Santa Anita	
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1	Park and Golden Gate Fields), Florida	
2	(Gulfstream Park and Gulfstream Park	
	West), Maryland (Pimlico and Laurel	
3	Park), and Oregon (Portland Meadows).	
4	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
	Association within the meaning of the	
5	IHA.	
6	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
	host State to conduct racing.	
7	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
8	agreement with its Horsemen's Group, as	
	required by the IHA.	
9	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
10	consent to Defendant to accept a wager	
	on a race run at any of Plaintiffs' race	
11	tracks.	
12	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
10	consent to Defendant to accept a wager	
13	from a resident of the States of	
14	California, Florida, Maryland or Oregon.	
15	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
13	money from Defendant with respect to	
16	wagers (or entry fees) accepted by	
17	Defendant	
1 /	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
18	agreements with any of the Plaintiffs.	
19	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
1)	received consent from any Plaintiff to	
20	accept wagers on races run at the	
21	Plaintiffs' race tracks.	
	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
22	received consent of any host racing	No. 62-7.
23	commission to accept wagers on	
	Plaintiffs' races.	
24	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
25	received consent from any off-track	<u>Docket</u> No. 62-7.
	racing association to conduct its contests.	
26	129. In response to New York's DFS	Declaration of Diane L. Ellis ("Ellis
27	legislation Derby Wars stopped accepting	Dec. Opp. to MSJ"), ¶3, Exhibit A;
	entry fees from residents of New York,	Midland Depo., 353:19-354:5; 485:13-
28		25.
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1	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶6.
2	website has access to the leaderboards, a	
	display of other participants' selections,	
3	and a graphic that displays how many	
4	people selected each horse, without paying an entry fee.	
5	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
6	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
0	no other source of revenue for the Derby	
7	Wars contests.	
8	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
9	model is that the cash prize in a contest	Midland Depo., 149:1-5.
	must be less than the cash entry fees. 133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
10	wager from a resident of California,	Lins Dec., 13, 13, 10. 02-7.
11	Florida, Maryland or Oregon, the host	
12	racing association in that state receives a	
13	payment as its "Market Access Fee" or	
	"Source Market Fee."	
14	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, <u>Docket</u> No. 62-
15	DerbyWars.com website.	5.
16	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
17	continually operated these contests on a daily basis since 2011.	Midland Depo., 124:24-125:1.
	daily basis since 2011.	
18		
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	PI AINTIEES, SEDARATE STAT	TEMENT OF ADDITIONAL MATERIAL FACTS

ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT'S ISSUE IB - THAT PLAINTIFFS' SECOND
CAUSE OF ACTION FOR ALLEGED VIOLATION OF CALIFORNIA
BUSINESS & PROFESSIONS CODE SECTIONS 17200, ET, SEQ. FAILS AS
A MATTER OF LAW

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC ("HRL") is	Midland Depo., 16:19-17:11, <u>Docket</u>
a Delaware limited liability company,	No. 62-5; Answer to First Amended
doing business in Louisville, Kentucky.	Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office	Midland Depo., 16:19-17:11; 161:7-12,
building in Kentucky.	<u>Docket</u> No. 62-5.
74. Defendant offers contests in which	Midland Depo., 166:9-167:4; 180:12-
players from across the country	181:24, <u>Docket</u> No. 62-5.
(including players in California, Florida,	
Maryland and Oregon), pay entry fees	
interstate (to Kentucky) in order to wager	
on races run at race tracks, including	
those operated by Plaintiffs.	
75. The first page of Defendant's Derby	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
Wars' website (www.derbywars.com)	
proclaims:	
"Horse Racing Handicapping	
Contests"	
"Play for free or real money"	
"Pick a horse in each race"	
"Over \$20-million paid out in	
winnings!"	
76. To participate in the contests, a	Midland Depo., 168:4-19, <u>Docket</u> No.
player must first create an account with	62-5.
Defendant and deposit funds to the	
account.	
77. Defendant maintains players' funds	Shutty Depo., 112:16-113:24, <u>Docket</u>
in a bank account consisting only of	No. 62-6; Midland Depo., 168:17-23;
players' funds, and when the player	327:15-23, <u>Docket</u> No. 62-5.
enters a contest, his account is deducted	,
by the amount of the wager (the "entry	

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	fee").	
	78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
	wager (the "prize"), his Derby Wars	No. 62-5.
	account is credited with his winnings.	
	The player can thereafter request a	
	withdrawal from his account, in which	
	case a check is sent to him from the	
	Derby Wars account.	
	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
	conduct wagering on horse racing in	Docket No. 62-5.
	California, Florida, Maryland or Oregon.	
	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
	allowing players to "win real money,"	Midland Depo., 181:22-24, Docket No.
	and the players do win real money.	62-5.
	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	that are "head-to-head".	
	82. In these contests, two players pay an	Midland Depo., 129:11-13, Docket No.
	entry fee for a fixed prize.	62-5.
	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	players each pay a \$22 entry fee to	, n /
	compete with each other.	
	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
	"rake" retained by Defendant.	Docket No. 62-5.
	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	contests with the prize up to \$1,500, with	" "
	\$799 entry fees.	
	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	players must select horses in 6 to 10	"
	different races running at various race	
	tracks, including Plaintiffs' tracks.	
	87. In the contests, "the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks", and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs' tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
		Docket No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, Docket No.
	(the most winnings) at the end of the	62-5.
	contest, wins the "prize."	
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90. Defendant also offers "high stakes" contests for up to \$300,000, with a \$2,200 entry fee.	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
91. In agreements with third parties,	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7;
Defendant even refers to its players as	Exhibit 6, p. 2, "Exhibit 5;" Ellis Dec., \P
"bettors."	- "
Dettors.	11, Exhibit 7, p. 2, "Exhibit 5;", Ellis Dec., ¶ 12, Exhibit 8, p. 2, "Exhibit 5."
92. A player is awarded points on the	Midland Depo., 134:6-135:5, <u>Docket</u>
same basis as if he had placed a \$2 bet at	No. 62-5.
the racetrack, subject to adjustment for	
maximum payouts.	
93. For instance, if a horse would pay	Midland Depo., 135:18-136:10, <u>Docket</u>
\$6.40, the player is awarded 6.40 points.	No. 62-5.
95. Derby Wars uses "points or dollars	Midland Depo., 136:6-10, Docket No.
interchangeably."	62-5.
96. The player has no influence over the	Midland Depo., 177:21-178:8, <u>Docket</u>
actual results of the horse race; at the	No. 62-5.
time when the player enters a contest, it	
is uncertain as to which horse will win	
the race.	
97. The winner of the contest will be	Midland Depo., 178:9-13, Docket No.
determined by future events.	62-5.
98. Many of the races used in the	Midland Depo., 180:12-181:21, <u>Docket</u>
contests take place at Plaintiffs' race	No. 62-5.
tracks in California, Florida, Maryland	
and Oregon.	
99. Unlike other sports, horseracing is	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
almost exclusively funded by wagering.	7 11 1 7 7
100. The total amount wagered is the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
"handle."	, , , , , , , , , , , , , , , , , , ,
101. By law, approximately eighty	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
percent of the handle is returned to the	, , , , , , , , , , , , , , , , , , ,
patrons who placed winning wagers.	
102. The remaining approximately	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
twenty percent is known as the "takeout,"	, , , , , , , , , , , , , , , , , , , ,
the amount initially retained by the race	
track.	
103. The takeout is then divided,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
pursuant to contract and law, among the	, , , , , , , , , , , , , , , , , , ,
stakeholders in the form of commissions	
paid to the racetracks; purses paid to the	
-12-	

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	owners, trainers and jockeys of the	
	horses in the race; taxes paid to the state;	
	and funds dedicated to equine research,	
	workers' compensation funds, worker	
	health and welfare, etc., that benefit the	
	backstretch workers.	
	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	horseracing includes "Win" (picking a	
	horse to finish first in the race), "Place"	
	(picking a horse to finish first or second	
	in the race) and "Show" (picking a horse	
	to finish first, second or third in the race).	
	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	Place or Show is called an exotic wager.	
	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	Double" (picking the winning horse in	
	two consecutive races), "Exacta"	
	(picking the first two horses to finish in a	
	single race in the exact order), "Trifecta"	
	(picking the first three horses to finish in	
	a single race in the exact order), "Pick	
	Three" (picking the winning horse in	
	three consecutive races), "Pick Four"	
	(picking the winning horse in four	
	consecutive races), and a "Pick Six"	
	(picking the winning horse in six	
	consecutive races.)	
	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed wagers when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
	racetrack.	D . D . 112 D . 1 . 11 . C . 2
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	only took place live (at the actual track	
	where the race was being run), such that	
	bettors had to attend the race to place a	
	wager.	Dometry Dog #12 Dog-1-4 No. 62.2
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers	
	at locations other than the track where	
	the race was being run.	Daruty Dag ¶ 12 Dookst No. 62.2
	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
- 1		

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1	which was explicitly intended to	
2	"regulate interstate commerce with	
	respect to wagering on horseracing." As	
3	provided therein, no one "may accept an	
4	interstate off-track wager except as	
_	provided in" the IHA.	
5	111. Defendant does not comply with the	Midland Depo., 190:16-24, <u>Docket</u> No.
6	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No. 62-6.
7	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
8	the industry has experienced much	
0	growth in the area of Advanced Deposit	
9	Wagering ("ADW").	
10	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
	with a licensed, regulated	
11	online/telephone wagering operator, and	
12	then issues wagering instructions (via	
13	telephone or internet) to that operator to	
	place a wager on a specific race using funds in the account.	
14	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
15	winning funds are deposited directly into	Daruty Dec., 14, Docket 110. 02 3.
16	the customer's account.	
	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
17	interstate wagers on horseraces by an	<u> </u>
18	entity (including an ADW operator),	
19	which has obtained consent from, inter	
19	alia, the host racing association on whose	
20	races such wagers are placed, such as	
21	Plaintiffs.	D (D (17 D 1 ()) (2 2
	116. It is customary in the industry for a host racing association to grant the	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
22	required consent only if it receives a	
23	payment of money or other value from	
24	the entity accepting the wagers.	
	117. Defendant has never been licensed	Midland Depo., 406:21-23.
25	as an ADW.	
26	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
27	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
28	(Gulfstream Park and Gulfstream Park	
1	-14-	

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1	West), Maryland (Pimlico and Laurel	
1	Park), and Oregon (Portland Meadows).	
2	119. Each Plaintiff is a Host Racing	Darruty Dog ¶ 18 Dogkat No. 62 2
3	Association within the meaning of the	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
	IHA.	
4	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
5	host State to conduct racing.	Daruty Dec., 19, <u>Docket</u> No. 02-3.
	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
6	agreement with its Horsemen's Group, as	Daruty Dec., 20, Docket 110. 02 3.
7	required by the IHA.	
8	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
8	consent to Defendant to accept a wager	
9	on a race run at any of Plaintiffs' race	
10	tracks.	
	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
11	consent to Defendant to accept a wager	
12	from a resident of the States of	
13	California, Florida, Maryland or Oregon.	
13	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
14	money from Defendant with respect to	
15	wagers (or entry fees) accepted by	
	Defendant	
16	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
17	agreements with any of the Plaintiffs.	D (D 421 D 1 () (2 2
10	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
18	received consent from any Plaintiff to	
19	accept wagers on races run at the Plaintiffs' race tracks.	
20	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, Docket
	received consent of any host racing	No. 62-7.
21	commission to accept wagers on	
22	Plaintiffs' races.	
23	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
23	received consent from any off-track	Docket No. 62-7.
24	racing association to conduct its contests.	
25	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
26	entry fees from residents of New York,	25.
27	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶6.
28	website has access to the leaderboards, a	
28	display of other participants' selections,	

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1	and a graphic that displays how many	
$_{2}$	people selected each horse, without	
	paying an entry fee.	
3	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
4	consist of entry fees only; Defendant has no other source of revenue for the Derby	Shutty Depo., 21:17-22.
5	Wars contests.	
6	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
7	model is that the cash prize in a contest	Midland Depo., 149:1-5.
	must be less than the cash entry fees. 133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
8	wager from a resident of California,	Ems Dec., ¶13, <u>Docket</u> No. 02-7.
9	Florida, Maryland or Oregon, the host	
10	racing association in that state receives a	
11	payment as its "Market Access Fee" or "Source Market Fee."	
12	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, Docket No. 62-
13	DerbyWars.com website.	5.
14	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
	continually operated these contests on a	Midland Depo., 124:24-125:1.
15	daily basis since 2011.	
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	DI AINTEEC, CEDADATE CTAT	EMENT OF ADDITIONAL MATERIAL FACTS

ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S ISSUE IC - THAT PLAINTIFFS' IHA CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC ("HRL") is	Midland Depo., 16:19-17:11, <u>Docket</u>
a Delaware limited liability company,	No. 62-5; Answer to First Amended
doing business in Louisville, Kentucky.	Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office	Midland Depo., 16:19-17:11; 161:7-12,
building in Kentucky.	<u>Docket</u> No. 62-5.
74. Defendant offers contests in which	Midland Depo., 166:9-167:4; 180:12-
players from across the country	181:24, <u>Docket</u> No. 62-5.
(including players in California, Florida,	
Maryland and Oregon), pay entry fees	
interstate (to Kentucky) in order to wager	
on races run at race tracks, including	
those operated by Plaintiffs.	
75. The first page of Defendant's Derby	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
Wars' website (www.derbywars.com)	
proclaims:	
"Horse Racing Handicapping	
Contests"	
"Play for free or real money"	
"Pick a horse in each race"	
"Over \$20-million paid out in	
winnings!"	
76. To participate in the contests, a	Midland Depo., 168:4-19, <u>Docket</u> No.
player must first create an account with	62-5.
Defendant and deposit funds to the	
account.	
77. Defendant maintains players' funds	Shutty Depo., 112:16-113:24, Docket
in a bank account consisting only of	No. 62-6; Midland Depo., 168:17-23;
players' funds, and when the player	327:15-23, <u>Docket</u> No. 62-5.
enters a contest, his account is deducted	,
by the amount of the wager (the "entry	
fee").	
78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
	Midialid Depo., 330.10-331.21, <u>D</u> ocket

PLAINTIFFS' SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

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1	account is credited with his winnings.	
2	The player can thereafter request a	
	withdrawal from his account, in which	
3	case a check is sent to him from the	
4	Derby Wars account.	
	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
5	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
6	California, Florida, Maryland or Oregon.	
7	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
7	allowing players to "win real money,"	Midland Depo., 181:22-24, <u>Docket</u> No.
8	and the players do win real money.	62-5.
	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
9	that are "head-to-head".	
10	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
11	entry fee for a fixed prize.	62-5.
11	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
12	players each pay a \$22 entry fee to	
13	compete with each other.	
	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
14	"rake" retained by Defendant.	Docket No. 62-5.
15	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	contests with the prize up to \$1,500, with	
16	\$799 entry fees.	Ell's Description of the Descrip
17	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
10	players must select horses in 6 to 10	
18	different races running at various race	
19	tracks, including Plaintiffs' tracks.	Filis Dac. ¶ 8 Dockat No. 62.7; and
20	87. In the contests, "the scores are calculated according to the actual	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks", and are	No. 62-5.
21	based upon the actual payoff amounts on	110. 02-3.
22	real horse races at real race tracks,	
	including Plaintiffs' tracks.	
23	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
24	co. The secres are carearated in donars.	Docket No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, Docket No.
25	(the most winnings) at the end of the	62-5.
26	contest, wins the "prize."	
27	90. Defendant also offers "high stakes"	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
27	contests for up to \$300,000, with a	
28	\$2,200 entry fee.	
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91. In agreements with third parties, Defendant even refers to its players as "bettors."	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7; Exhibit 6, p. 2, "Exhibit 5;" Ellis Dec., ¶ 11, Exhibit 7, p. 2, "Exhibit 5;", Ellis Dec., ¶ 12, Exhibit 8, p. 2, "Exhibit 5."
92. A player is awarded points on the	Midland Depo., 134:6-135:5, <u>Docket</u>
same basis as if he had placed a \$2 bet at	No. 62-5.
the racetrack, subject to adjustment for	
maximum payouts.	
93. For instance, if a horse would pay	Midland Depo., 135:18-136:10, <u>Docket</u>
\$6.40, the player is awarded 6.40 points.	No. 62-5.
95. Derby Wars uses "points or dollars	Midland Depo., 136:6-10, Docket No.
interchangeably."	62-5.
96. The player has no influence over the	Midland Depo., 177:21-178:8, <u>Docket</u>
actual results of the horse race; at the	No. 62-5.
time when the player enters a contest, it	110. 02 5.
is uncertain as to which horse will win	
the race.	
97. The winner of the contest will be	Midland Depo., 178:9-13, Docket No.
determined by future events.	62-5.
98. Many of the races used in the	Midland Depo., 180:12-181:21, <u>Docket</u>
contests take place at Plaintiffs' race	No. 62-5.
tracks in California, Florida, Maryland	110. 02 5.
and Oregon.	
99. Unlike other sports, horseracing is	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
almost exclusively funded by wagering.	2 at any 2 con, o, 1 o, <u>2 control</u> 1 con o2 co
100. The total amount wagered is the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
"handle."	
101. By law, approximately eighty	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
percent of the handle is returned to the	2 at any 2 con, 10, <u>2 control</u> 1101 02 co
patrons who placed winning wagers.	
102. The remaining approximately	Daruty Dec., ¶ 10, Docket No. 62-3.
twenty percent is known as the "takeout,"	1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
the amount initially retained by the race	
track.	
103. The takeout is then divided,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
pursuant to contract and law, among the) / "
stakeholders in the form of commissions	
paid to the racetracks; purses paid to the	
owners, trainers and jockeys of the	
horses in the race; taxes paid to the state;	
and funds dedicated to equine research,	
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1	workers' compensation funds, worker	
2	health and welfare, etc., that benefit the backstretch workers.	
3	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
4	horseracing includes "Win" (picking a	
4	horse to finish first in the race), "Place"	
5	(picking a horse to finish first or second	
6	in the race) and "Show" (picking a horse	
7	to finish first, second or third in the race).	
7	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8	Place or Show is called an exotic wager.	Dometry Dog #11 Doglest No. 62.2
9	106. Exotic wagers include the "Daily Double" (picking the winning horse in	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	two consecutive races), "Exacta"	
10	(picking the first two horses to finish in a	
11	single race in the exact order), "Trifecta"	
12	(picking the first three horses to finish in	
	a single race in the exact order), "Pick	
13	Three" (picking the winning horse in	
14	three consecutive races), "Pick Four"	
15	(picking the winning horse in four	
	consecutive races), and a "Pick Six" (picking the winning horse in six	
16	consecutive races.)	
17	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, Docket
18	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed wagers when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
19	racetrack.	
20	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
21	only took place live (at the actual track	
	where the race was being run), such that	
22	bettors had to attend the race to place a	
23	wager. 109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
24	facilities opened, which accepted wagers	12, <u>Docket</u> 110. 02 3.
	at locations other than the track where	
25	the race was being run.	
26	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
27	which was explicitly intended to	
	"regulate interstate commerce with	
28	respect to wagering on horseracing." As -20-	

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1	provided therein, no one "may accept an	
2	interstate off-track wager except as provided in" the IHA.	
3	111. Defendant does not comply with the	Midland Depo., 190:16-24, Docket No.
4	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No. 62-6.
5	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
6	the industry has experienced much	
	growth in the area of Advanced Deposit	
7	Wagering ("ADW").	Dametra Dea #14 Dealest No. 62.2
8	113. In ADW, a customer deposits funds with a licensed, regulated	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
9	online/telephone wagering operator, and	
10	then issues wagering instructions (via	
11	telephone or internet) to that operator to	
	place a wager on a specific race using	
12	funds in the account. 114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
13	winning funds are deposited directly into	Daracy Bee., 1 1, <u>Booker</u> 110. 02 3.
14	the customer's account.	
15	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
16	interstate wagers on horseraces by an entity (including an ADW operator),	
	which has obtained consent from, <i>inter</i>	
17	alia, the host racing association on whose	
18	races such wagers are placed, such as	
19	Plaintiffs.	Dometry Dog #17 Dogket No. 62.2
20	116. It is customary in the industry for a host racing association to grant the	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
	required consent only if it receives a	
21	payment of money or other value from	
22	the entity accepting the wagers.	NC II 1D 40C 21 22
23	117. Defendant has never been licensed as an ADW.	Midland Depo., 406:21-23.
24	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
25	at race tracks in California (Santa Anita	, , , , <u> </u>
	Park and Golden Gate Fields), Florida	
26	(Gulfstream Park and Gulfstream Park	
27	West), Maryland (Pimlico and Laurel Park), and Oregon (Portland Meadows).	
28	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
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1	Association within the meaning of the	
2	IHA.	Dometry Dog # 10 Doglest No. 62.2
3	120. Each Plaintiff has the approval of its host State to conduct racing.	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
4	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
4	agreement with its Horsemen's Group, as	
5	required by the IHA.	
6	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
7	consent to Defendant to accept a wager	
7	on a race run at any of Plaintiffs' race	
8	tracks.	D (D 422 D 1 (N 622
9	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
	consent to Defendant to accept a wager from a resident of the States of	
10	California, Florida, Maryland or Oregon.	
11	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
12	money from Defendant with respect to	
	wagers (or entry fees) accepted by	
13	Defendant	
14	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
15	agreements with any of the Plaintiffs.	
	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
16	received consent from any Plaintiff to	
17	accept wagers on races run at the Plaintiffs' race tracks.	
18	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, Docket
	received consent of any host racing	No. 62-7.
19	commission to accept wagers on	
20	Plaintiffs' races.	
21	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
	received consent from any off-track	<u>Docket</u> No. 62-7.
22	racing association to conduct its contests.	Ell', D., O., A. MOL 400 E. 1.11.1. A
23	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
24	legislation Derby Wars stopped accepting entry fees from residents of New York,	Midland Depo., 353:19-354:5; 485:13-25.
	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7
25	website has access to the leaderboards, a	
26	display of other participants' selections,	
27	and a graphic that displays how many	
	people selected each horse, without	
28	paying an entry fee.	

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1	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
2	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
3	no other source of revenue for the Derby Wars contests.	
	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
4	model is that the cash prize in a contest	Midland Depo., 149:1-5.
5	must be less than the cash entry fees.	
6	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
7	wager from a resident of California, Florida, Maryland or Oregon, the host	
8	racing association in that state receives a	
	payment as its "Market Access Fee" or	
9	"Source Market Fee."	
10	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, Docket No. 62-
11	DerbyWars.com website.	5.
12	135. Defendant admits that that it has continually operated these contests on a	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A, Midland Depo., 124:24-125:1.
13	daily basis since 2011.	Wildiand Depo., 124.24-123.1.
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		EMENT OF ADDITIONAL MATERIAL FACTS

ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S ISSUE IB - THAT PLAINTIFFS' SECOND CAUSE OF ACTION FOR ALLEGED VIOLATION OF CALIFORNIA BUSINESS & & PROFESSIONS CODE SECTIONS 17200, ET, SEQ. FAILS AS A MATTER OF LAW

6 7	UNDISPUTED MATERIAL FACTS	EVIDENCE
8	72. Horse Racing Labs, LLC ("HRL") is	Midland Depo
	a Delaware limited liability company,	No. 62-5; Ans
9	doing business in Louisville, Kentucky.	Complaint, (D
10	73. Defendant operates out of an office	Midland Depo
	building in Kentucky.	Docket No. 62
11	74. Defendant offers contests in which	Midland Depo
12	players from across the country	181:24, <u>Docke</u>
	(including players in California, Florida,	
13	Maryland and Oregon), pay entry fees	
14	interstate (to Kentucky) in order to wager	
	on races run at race tracks, including	
15	those operated by Plaintiffs.	
16	75. The first page of Defendant's Derby	Ellis Dec., ¶ 4
17	Wars' website (www.derbywars.com)	, ,
17	proclaims:	
18	"Horse Racing Handicapping	
	Contagts?	

UNDISTUTED WATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC ("HRL") is	Midland Depo., 16:19-17:11, <u>Docket</u>
a Delaware limited liability company,	No. 62-5; Answer to First Amended
doing business in Louisville, Kentucky.	Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office	Midland Depo., 16:19-17:11; 161:7-12,
building in Kentucky.	<u>Docket</u> No. 62-5.
74. Defendant offers contests in which	Midland Depo., 166:9-167:4; 180:12-
players from across the country	181:24, <u>Docket</u> No. 62-5.
(including players in California, Florida,	
Maryland and Oregon), pay entry fees	
interstate (to Kentucky) in order to wager	
on races run at race tracks, including	
those operated by Plaintiffs.	
75. The first page of Defendant's Derby	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
Wars' website (www.derbywars.com)	
proclaims:	
"Horse Racing Handicapping	
Contests"	
"Play for free or real money"	
"Pick a horse in each race"	
"Over \$20-million paid out in	
winnings!"	
76. To participate in the contests, a	Midland Depo., 168:4-19, <u>Docket</u> No.
player must first create an account with	62-5.
Defendant and deposit funds to the	
account.	
77. Defendant maintains players' funds	Shutty Depo., 112:16-113:24, <u>Docket</u>
in a bank account consisting only of	No. 62-6; Midland Depo., 168:17-23;
players' funds, and when the player	327:15-23, <u>Docket</u> No. 62-5.
enters a contest, his account is deducted	
by the amount of the wager (the "entry	
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	fee").	
	78. If the player eventually wins his	Midland Depo., 330:10-331:21, <u>Docket</u>
	wager (the "prize"), his Derby Wars	No. 62-5.
	account is credited with his winnings.	
	The player can thereafter request a	
	withdrawal from his account, in which	
	case a check is sent to him from the	
	Derby Wars account.	
	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
	conduct wagering on horse racing in	Docket No. 62-5.
	California, Florida, Maryland or Oregon.	
	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
	allowing players to "win real money,"	Midland Depo., 181:22-24, <u>Docket</u> No.
	and the players do win real money.	62-5.
	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	that are "head-to-head".	200., 0, <u>200.00</u> 110. 02 7.
	82. In these contests, two players pay an	Midland Depo., 129:11-13, Docket No.
	entry fee for a fixed prize.	62-5.
	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	players each pay a \$22 entry fee to	Ems Dec., 0, <u>Docket</u> 110. 02 7.
	compete with each other.	
	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
	"rake" retained by Defendant.	Docket No. 62-5.
	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	contests with the prize up to \$1,500, with	2 1 10 02 7
	\$799 entry fees.	
	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	players must select horses in 6 to 10	Ems Bee., 3, <u>Beeket</u> 1.0. 62 7.
	different races running at various race	
	tracks, including Plaintiffs' tracks.	
	87. In the contests, "the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
	payouts at actual race tracks", and are	No. 62-5.
	based upon the actual payoff amounts on	
	real horse races at real race tracks,	
	including Plaintiffs' tracks.	
	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
	co. The scores are calculated in contain.	Docket No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
	(the most winnings) at the end of the	62-5.
	contest, wins the "prize."	
\parallel	-25-	<u> </u>

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90. Defendant also offers "high stakes" contests for up to \$300,000, with a \$2,200 entry fee.	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
91. In agreements with third parties,	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7;
Defendant even refers to its players as	Exhibit 6, p. 2, "Exhibit 5;" Ellis Dec., ¶
"bettors."	11, Exhibit 7, p. 2, "Exhibit 5;", Ellis
bettors.	Dec., ¶ 12, Exhibit 8, p. 2, "Exhibit 5."
92. A player is awarded points on the	Midland Depo., 134:6-135:5, Docket
same basis as if he had placed a \$2 bet at	No. 62-5.
the racetrack, subject to adjustment for	
maximum payouts.	
93. For instance, if a horse would pay	Midland Depo., 135:18-136:10, <u>Docket</u>
\$6.40, the player is awarded 6.40 points.	No. 62-5.
95. Derby Wars uses "points or dollars	Midland Depo., 136:6-10, <u>Docket</u> No.
interchangeably."	62-5.
96. The player has no influence over the	Midland Depo., 177:21-178:8, <u>Docket</u>
actual results of the horse race; at the	No. 62-5.
time when the player enters a contest, it	
is uncertain as to which horse will win	
the race.	
97. The winner of the contest will be	Midland Depo., 178:9-13, Docket No.
determined by future events.	62-5.
98. Many of the races used in the	Midland Depo., 180:12-181:21, <u>Docket</u>
contests take place at Plaintiffs' race	No. 62-5.
tracks in California, Florida, Maryland	
and Oregon.	
99. Unlike other sports, horseracing is	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
almost exclusively funded by wagering.	
100. The total amount wagered is the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
"handle."	
101. By law, approximately eighty	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
percent of the handle is returned to the	
patrons who placed winning wagers.	
102. The remaining approximately	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
twenty percent is known as the "takeout,"	
the amount initially retained by the race	
track.	
11 400 551 1 1 1 1 1 1	
103. The takeout is then divided,	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
pursuant to contract and law, among the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
<u> </u>	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.

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1	owners, trainers and jockeys of the	
2	horses in the race; taxes paid to the state; and funds dedicated to equine research,	
3	workers' compensation funds, worker	
4	health and welfare, etc., that benefit the	
4	backstretch workers.	
5	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
6	horseracing includes "Win" (picking a	
	horse to finish first in the race), "Place"	
7	(picking a horse to finish first or second	
8	in the race) and "Show" (picking a horse	
9	to finish first, second or third in the race).	Dometry Dog #11 Dogket No. 62.2
	105. Any type of wager other than Win, Place or Show is called an exotic wager.	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
10	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, Docket No. 62-3.
11	Double" (picking the winning horse in	Dataty Dec., 11, Docket 140, 02-3.
12	two consecutive races), "Exacta"	
	(picking the first two horses to finish in a	
13	single race in the exact order), "Trifecta"	
14	(picking the first three horses to finish in	
15	a single race in the exact order), "Pick	
13	Three" (picking the winning horse in	
16	three consecutive races), "Pick Four"	
17	(picking the winning horse in four consecutive races), and a "Pick Six"	
10	(picking the winning horse in six	
18	consecutive races.)	
19	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
20	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
	are indeed wagers when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
21	racetrack.	
22	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
23	only took place live (at the actual track	
	where the race was being run), such that	
24	bettors had to attend the race to place a	
25	wager.	Dometry Dog. #12 De-sleet No. (2.2
26	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
	facilities opened, which accepted wagers at locations other than the track where	
27	the race was being run.	
28	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
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1	which was explicitly intended to	
$_{2}$	"regulate interstate commerce with	
	respect to wagering on horseracing." As	
3	provided therein, no one "may accept an	
4	interstate off-track wager except as	
ا ہ	provided in" the IHA.	
5	111. Defendant does not comply with the	Midland Depo., 190:16-24, Docket No.
6	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No. 62-6.
7	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
8	the industry has experienced much	
	growth in the area of Advanced Deposit	
9	Wagering ("ADW").	
10	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
11	with a licensed, regulated	
	online/telephone wagering operator, and	
12	then issues wagering instructions (via telephone or internet) to that operator to	
13	place a wager on a specific race using	
1.4	funds in the account.	
14	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
15	winning funds are deposited directly into	Buruty Bee., 14, <u>Booket</u> 110. 02 3.
16	the customer's account.	
	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
17	interstate wagers on horseraces by an	7 " 7 — —
18	entity (including an ADW operator),	
10	which has obtained consent from, inter	
19	alia, the host racing association on whose	
20	races such wagers are placed, such as	
21	Plaintiffs.	
	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
22	host racing association to grant the	
23	required consent only if it receives a	
24	payment of money or other value from	
24	the entity accepting the wagers. 117. Defendant has never been licensed	Midland Dano 406:21-23
25	as an ADW.	Midland Depo., 406:21-23.
26	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
27	at race tracks in California (Santa Anita	
	Park and Golden Gate Fields), Florida	
28	(Gulfstream Park and Gulfstream Park -28-	
11	- / ろ-	

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1	West Marriand (Dimline and Learn)	
1	West), Maryland (Pimlico and Laurel	
2	Park), and Oregon (Portland Meadows).	Dameta Dag # 10 Daglart No. (2.2
3	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
	Association within the meaning of the IHA.	
4		Dometry Dog # 10 Doglest No. 62.2
5	120. Each Plaintiff has the approval of its host State to conduct racing.	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
6	agreement with its Horsemen's Group, as	Daruty Dec., 20, <u>Docket</u> No. 02-3.
7	required by the IHA.	
	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
8	consent to Defendant to accept a wager	Daracty Dec., 22, Docket 110. 02 3.
9	on a race run at any of Plaintiffs' race	
10	tracks.	
	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
11	consent to Defendant to accept a wager	
12	from a resident of the States of	
10	California, Florida, Maryland or Oregon.	
13	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
14	money from Defendant with respect to	
15	wagers (or entry fees) accepted by	
	Defendant	
16	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
17	agreements with any of the Plaintiffs.	D. D. GOLD L. N. CO.O.
	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
18	received consent from any Plaintiff to	
19	accept wagers on races run at the Plaintiffs' race tracks.	
20		Midland Dana 211:24 212:7 Dockat
	127. Defendant has never requested nor received consent of any host racing	Midland Depo., 211:24-212:7, <u>Docket</u> No. 62-7.
21	commission to accept wagers on	110.02 1.
22	Plaintiffs' races.	
	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
23	received consent from any off-track	Docket No. 62-7.
24	racing association to conduct its contests.	
25	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
26	entry fees from residents of New York,	25.
27	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7.
	website has access to the leaderboards, a	
28	display of other participants' selections,	
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1	and a graphic that displays how many	
2	people selected each horse, without	
2	paying an entry fee.	
3	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
4	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
5	no other source of revenue for the Derby Wars contests.	
6	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
6	model is that the cash prize in a contest	Midland Depo., 149:1-5.
7	must be less than the cash entry fees.	-
8	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
9	wager from a resident of California,	
	Florida, Maryland or Oregon, the host racing association in that state receives a	
10	payment as its "Market Access Fee" or	
11	"Source Market Fee."	
12	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, Docket No. 62-
13	DerbyWars.com website.	5.
14	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
	continually operated these contests on a	Midland Depo., 124:24-125:1.
15	daily basis since 2011.	
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		TEMENT OF ADDITIONAL MATERIAL FACTS

ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S ISSUE ID - THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE EQUITABLE DOCTRINE OF ESTOPPEL

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC ("HRL") is	Midland Depo., 16:19-17:11, <u>Docket</u>
a Delaware limited liability company,	No. 62-5; Answer to First Amended
doing business in Louisville, Kentucky.	Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office	Midland Depo., 16:19-17:11; 161:7-12,
building in Kentucky.	<u>Docket</u> No. 62-5.
74. Defendant offers contests in which	Midland Depo., 166:9-167:4; 180:12-
players from across the country	181:24, <u>Docket</u> No. 62-5.
(including players in California, Florida,	
Maryland and Oregon), pay entry fees	
interstate (to Kentucky) in order to wager	
on races run at race tracks, including	
those operated by Plaintiffs.	
75. The first page of Defendant's Derby	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
Wars' website (www.derbywars.com)	
proclaims:	
"Horse Racing Handicapping	
Contests"	
"Play for free or real money"	
"Pick a horse in each race"	
"Over \$20-million paid out in	
winnings!"	
76. To participate in the contests, a	Midland Depo., 168:4-19, <u>Docket</u> No.
player must first create an account with	62-5.
Defendant and deposit funds to the	
T	
account.	
_	Shutty Depo., 112:16-113:24, <u>Docket</u>
account.	Shutty Depo., 112:16-113:24, <u>Docket</u> No. 62-6; Midland Depo., 168:17-23;
account. 77. Defendant maintains players' funds	_
account. 77. Defendant maintains players' funds in a bank account consisting only of	No. 62-6; Midland Depo., 168:17-23;
account. 77. Defendant maintains players' funds in a bank account consisting only of players' funds, and when the player	No. 62-6; Midland Depo., 168:17-23;
account. 77. Defendant maintains players' funds in a bank account consisting only of players' funds, and when the player enters a contest, his account is deducted	No. 62-6; Midland Depo., 168:17-23;
account. 77. Defendant maintains players' funds in a bank account consisting only of players' funds, and when the player enters a contest, his account is deducted by the amount of the wager (the "entry")	No. 62-6; Midland Depo., 168:17-23;

PLAINTIFFS' SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

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1	account is credited with his winnings.	
2	The player can thereafter request a	
	withdrawal from his account, in which	
3	case a check is sent to him from the	
4	Derby Wars account.	
	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
5	conduct wagering on horse racing in	<u>Docket</u> No. 62-5.
6	California, Florida, Maryland or Oregon.	
	80. Defendant touts its contests as	Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
7	allowing players to "win real money,"	Midland Depo., 181:22-24, <u>Docket</u> No.
8	and the players do win real money.	62-5.
	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
9	that are "head-to-head".	
10	82. In these contests, two players pay an	Midland Depo., 129:11-13, <u>Docket</u> No.
11	entry fee for a fixed prize.	62-5.
11	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
12	players each pay a \$22 entry fee to	
13	compete with each other.	
13	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
14	"rake" retained by Defendant.	Docket No. 62-5.
15	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	contests with the prize up to \$1,500, with	
16	\$799 entry fees.	
17	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
	players must select horses in 6 to 10	
18	different races running at various race	
19	tracks, including Plaintiffs' tracks.	
20	87. In the contests, "the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
20	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
21	payouts at actual race tracks", and are	No. 62-5.
22	based upon the actual payoff amounts on	
22	real horse races at real race tracks,	
23	including Plaintiffs' tracks.	Midland Dana 126:0 10: 156:4 6
24	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
	20. The player with the biggest healtreal	Docket No. 62-5. Midland Dana 180:12 22 Docket No.
25	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
26	(the most winnings) at the end of the	62-5.
	contest, wins the "prize." 90. Defendant also offers "high stakes"	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
27	contests for up to \$300,000, with a	EIIIS Dec., 1, <u>Docket</u> No. 02-1.
28	\$2,200 entry fee.	
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1	workers' compensation funds, worker	
2	health and welfare, etc., that benefit the backstretch workers.	
3	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
4	horseracing includes "Win" (picking a	<u> </u>
	horse to finish first in the race), "Place"	
5	(picking a horse to finish first or second	
6	in the race) and "Show" (picking a horse	
	to finish first, second or third in the race).	
7	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
8	Place or Show is called an exotic wager.	D (D 411 D 1 (N 622
9	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	Double" (picking the winning horse in	
10	two consecutive races), "Exacta" (picking the first two horses to finish in a	
11	single race in the exact order), "Trifecta"	
12	(picking the first three horses to finish in	
	a single race in the exact order), "Pick	
13	Three" (picking the winning horse in	
14	three consecutive races), "Pick Four"	
15	(picking the winning horse in four	
	consecutive races), and a "Pick Six"	
16	(picking the winning horse in six	
17	consecutive races.) 107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, <u>Docket</u>
18	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
10	are indeed <i>wagers</i> when placed at the	100:3; 102:17-19. <u>Docket</u> No. 62-6.
19	racetrack.	
20	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
21	only took place live (at the actual track	
21	where the race was being run), such that	
22	bettors had to attend the race to place a	
23	wager.	D (D 412 D 1 ()) (2.2
	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
24	facilities opened, which accepted wagers at locations other than the track where	
25	the race was being run.	
26	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, Docket No. 62-3.
	which was explicitly intended to	2 may 2000, 10, <u>20000</u> 110, 02 3.
27	"regulate interstate commerce with	
28	respect to wagering on horseracing." As	
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1	provided therein, no one "may accept an	
2	interstate off-track wager except as provided in" the IHA.	
3	111. Defendant does not comply with the	Midland Depo., 190:16-24, Docket No.
4	IHA.	62-5; Shutty Depo., 92:9-14, <u>Docket</u> No. 62-6.
5	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
6	the industry has experienced much	
7	growth in the area of Advanced Deposit	
	Wagering ("ADW"). 113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
8	with a licensed, regulated	Daracy Bee., 14, <u>Booker</u> 110. 02 3.
9	online/telephone wagering operator, and	
10	then issues wagering instructions (via	
11	telephone or internet) to that operator to place a wager on a specific race using	
12	funds in the account.	
	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
13	winning funds are deposited directly into	
14	the customer's account. 115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
15	interstate wagers on horseraces by an	Daruty Dec., 10, <u>Docket</u> 10. 02-3.
16	entity (including an ADW operator),	
17	which has obtained consent from, <i>inter</i>	
18	alia, the host racing association on whose races such wagers are placed, such as	
	Plaintiffs.	
19	116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
20	host racing association to grant the	
21	required consent only if it receives a payment of money or other value from	
22	the entity accepting the wagers.	
23	117. Defendant has never been licensed	Midland Depo., 406:21-23.
	as an ADW.	
24	118. Plaintiffs operate horse racing meets at race tracks in California (Santa Anita	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
25	Park and Golden Gate Fields), Florida	
26	(Gulfstream Park and Gulfstream Park	
27	West), Maryland (Pimlico and Laurel	
28	Park), and Oregon (Portland Meadows).	Daruty Dec. ¶ 19 Dooket No. 62.2
20	119. Each Plaintiff is a Host Racing -35-	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.

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1	Association within the meaning of the	
2	IHA.	D. (D. (10 D. 1.4 N. (2.2
3	120. Each Plaintiff has the approval of its host State to conduct racing.	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
4	agreement with its Horsemen's Group, as	Burdey Bee., 20, <u>Booker</u> 110. 02 3.
5	required by the IHA.	
6	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
	consent to Defendant to accept a wager	
7	on a race run at any of Plaintiffs' race	
8	tracks.	
9	123. No Plaintiff has ever provided	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
9	consent to Defendant to accept a wager	
10	from a resident of the States of	
11	California, Florida, Maryland or Oregon.	Dometry Dog # 24 Dog-1-4 No. 62 2
	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
12	money from Defendant with respect to wagers (or entry fees) accepted by	
13	Defendant	
14	125. Defendant does not have any	Daruty Dec., ¶ 25, Docket No. 62-3.
	agreements with any of the Plaintiffs.	Burdey Beet, 23, <u>Booker</u> 110. 02 3.
15	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
16	received consent from any Plaintiff to	
17	accept wagers on races run at the	
1/	Plaintiffs' race tracks.	
18	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, <u>Docket</u>
19	received consent of any host racing	No. 62-7.
	commission to accept wagers on	
20	Plaintiffs' races.	M. II 1 D 212 0 11 212 2 5
21	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
22	received consent from any off-track racing association to conduct its contests.	Docket No. 62-7.
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
23	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
24	entry fees from residents of New York,	25.
25	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7.
23	website has access to the leaderboards, a	, u
26	display of other participants' selections,	
27	and a graphic that displays how many	
	people selected each horse, without	
28	paying an entry fee.	

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1	131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
2	consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
3	no other source of revenue for the Derby Wars contests.	
	132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
4	model is that the cash prize in a contest	Midland Depo., 149:1-5.
5	must be less than the cash entry fees.	•
6	133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
7	wager from a resident of California, Florida, Maryland or Oregon, the host	
8	racing association in that state receives a	
	payment as its "Market Access Fee" or	
9	"Source Market Fee."	
10	134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, Docket No. 62-
11	DerbyWars.com website.	5.
12	135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A, Midland Depo., 124:24-125:1.
13	continually operated these contests on a daily basis since 2011.	Wildiand Depo., 124.24-123.1.
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ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S ISSUE IE - THAT THE COURT SHOULD ABSTAIN FROM ADJUDICATING PLAINTIFFS' CLAIMS, IN DEFERENCE TO LEGISLATIVE FUNCTION

UNDISPUTED MATERIAL FACTS	EVIDENCE
72. Horse Racing Labs, LLC ("HRL") is	Midland Depo., 16:19-17:11, <u>Docket</u>
a Delaware limited liability company,	No. 62-5; Answer to First Amended
doing business in Louisville, Kentucky.	Complaint, (Docket No. 34), ¶ 11.
73. Defendant operates out of an office	Midland Depo., 16:19-17:11; 161:7-12,
building in Kentucky.	<u>Docket</u> No. 62-5.
74. Defendant offers contests in which	Midland Depo., 166:9-167:4; 180:12-
players from across the country	181:24, <u>Docket</u> No. 62-5.
(including players in California, Florida,	
Maryland and Oregon), pay entry fees	
interstate (to Kentucky) in order to wager	
on races run at race tracks, including	
those operated by Plaintiffs.	
75. The first page of Defendant's Derby	Ellis Dec., ¶ 4. <u>Docket</u> No. 62-7.
Wars' website (www.derbywars.com)	
proclaims:	
"Horse Racing Handicapping	
Contests"	
"Play for free or real money"	
"Pick a horse in each race"	
"Over \$20-million paid out in	
winnings!"	
7.6 m	1611 1D 160 110 D 1 11
76. To participate in the contests, a	Midland Depo., 168:4-19, <u>Docket</u> No.
player must first create an account with	62-5.
Defendant and deposit funds to the	
account.	GI D
77. Defendant maintains players' funds	Shutty Depo., 112:16-113:24, <u>Docket</u>
in a bank account consisting only of	No. 62-6; Midland Depo., 168:17-23;
players' funds, and when the player	327:15-23, <u>Docket</u> No. 62-5.
enters a contest, his account is deducted	
by the amount of the wager (the "entry	
fee").	N. H I.D
78. If the player eventually wing his	Midland Depo., 330:10-331:21, <u>Docket</u>

PLAINTIFFS' SEPARATE STATEMENT OF ADDITIONAL MATERIAL FACTS

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1	wager (the "prize"), his Derby Wars	No. 62-5.
2	account is credited with his winnings.	
	The player can thereafter request a	
3	withdrawal from his account, in which	
4	case a check is sent to him from the	
_	Derby Wars account.	
5	79. Defendant does not hold a license to	Midland Depo., 229:9-24; 406:21-23,
6	conduct wagering on horse racing in	Docket No. 62-5.
7	California, Florida, Maryland or Oregon. 80. Defendant touts its contests as	Ellis Dec. ¶ 4. Decket No. 62.7:
		Ellis Dec., ¶ 4, <u>Docket</u> No. 62-7;
8	allowing players to "win real money," and the players do win real money.	Midland Depo., 181:22-24, <u>Docket</u> No. 62-5.
9	81. Defendant primarily offers contests	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
10	that are "head-to-head".	Lins Dec., ∥ 0, <u>Docket</u> 110. 02-7.
10	82. In these contests, two players pay an	Midland Depo., 129:11-13, Docket No.
11	entry fee for a fixed prize.	62-5.
12	83. As an example, for a \$40 prize, two	Ellis Dec., ¶ 6, <u>Docket</u> No. 62-7.
	players each pay a \$22 entry fee to	
13	compete with each other.	
14	84. The remaining \$4 is the "take out" or	Midland Depo., 220:13-22; 233:6-10,
15	"rake" retained by Defendant.	Docket No. 62-5.
	85. Defendant offers head-to-head	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
16	contests with the prize up to \$1,500, with	
17	\$799 entry fees.	Ellio Doo . # F. Doollot No. CO. 7
10	86. Depending upon the contest, the	Ellis Dec., ¶ 5, <u>Docket</u> No. 62-7.
18	players must select horses in 6 to 10 different races running at various race	
19	tracks, including Plaintiffs' tracks.	
20	87. In the contests, "the scores are	Ellis Dec., ¶ 8, <u>Docket</u> No. 62-7; and
	calculated according to the actual	Midland Depo., 180:16-181:21, <u>Docket</u>
21	payouts at actual race tracks", and are	No. 62-5.
22	based upon the actual payoff amounts on	
23	real horse races at real race tracks,	
	including Plaintiffs' tracks.	
24	88. The scores are calculated in dollars.	Midland Depo., 136:9-10; 156:4-6,
25		<u>Docket</u> No. 62-5.
	89. The player with the biggest bankroll	Midland Depo., 180:12-22, <u>Docket</u> No.
26	(the most winnings) at the end of the	62-5.
27	contest, wins the "prize."	Ellia Dag. #7 Daglart No. 40.7
28	90. Defendant also offers "high stakes"	Ellis Dec., ¶ 7, <u>Docket</u> No. 62-7.
	contests for up to \$300,000, with a	

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1	\$2,200 entry fee.	
2	91. In agreements with third parties,	Ellis Dec., ¶ 10, <u>Docket</u> No. 62-7;
2	Defendant even refers to its players as	Exhibit 6, p. 2, "Exhibit 5;" Ellis Dec., ¶
3	"bettors."	11, Exhibit 7, p. 2, "Exhibit 5;", Ellis
4		Dec., ¶ 12, Exhibit 8, p. 2, "Exhibit 5."
	92. A player is awarded points on the	Midland Depo., 134:6-135:5, <u>Docket</u>
5	same basis as if he had placed a \$2 bet at	No. 62-5.
6	the racetrack, subject to adjustment for	
	maximum payouts.	
7	93. For instance, if a horse would pay	Midland Depo., 135:18-136:10, <u>Docket</u>
8	\$6.40, the player is awarded 6.40 points.	No. 62-5.
9	95. Derby Wars uses "points or dollars	Midland Depo., 136:6-10, <u>Docket</u> No.
9	interchangeably."	62-5.
10	96. The player has no influence over the	Midland Depo., 177:21-178:8, <u>Docket</u>
11	actual results of the horse race; at the	No. 62-5.
	time when the player enters a contest, it	
12	is uncertain as to which horse will win the race.	
13	97. The winner of the contest will be	Midland Depo., 178:9-13, Docket No.
14	determined by future events.	62-5.
14	98. Many of the races used in the	Midland Depo., 180:12-181:21, <u>Docket</u>
15	contests take place at Plaintiffs' race	No. 62-5.
16	tracks in California, Florida, Maryland	
	and Oregon.	
17	99. Unlike other sports, horseracing is	Daruty Dec., ¶¶ 8, 10, <u>Docket</u> No. 62-3.
18	almost exclusively funded by wagering.	
19	100. The total amount wagered is the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
	"handle."	
20	101. By law, approximately eighty	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
21	percent of the handle is returned to the	
22	patrons who placed winning wagers.	
22	102. The remaining approximately	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
23	twenty percent is known as the "takeout,"	
24	the amount initially retained by the race track.	
	103. The takeout is then divided,	Daruty Dac. ¶ 10. Docket No. 62.3
25	pursuant to contract and law, among the	Daruty Dec., ¶ 10, <u>Docket</u> No. 62-3.
26	stakeholders in the form of commissions	
27	paid to the racetracks; purses paid to the	
27	owners, trainers and jockeys of the	
28	horses in the race; taxes paid to the state;	
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1	and funds dedicated to equine research,	
2	workers' compensation funds, worker	
	health and welfare, etc., that benefit the	
3	backstretch workers.	
4	104. The type of wagering available on	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
_	horseracing includes "Win" (picking a	
5	horse to finish first in the race), "Place"	
6	(picking a horse to finish first or second	
_	in the race) and "Show" (picking a horse	
7	to finish first, second or third in the race).	
8	105. Any type of wager other than Win,	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
	Place or Show is called an exotic wager.	
9	106. Exotic wagers include the "Daily	Daruty Dec., ¶ 11, <u>Docket</u> No. 62-3.
10	Double" (picking the winning horse in	
11	two consecutive races), "Exacta"	
11	(picking the first two horses to finish in a	
12	single race in the exact order), "Trifecta"	
13	(picking the first three horses to finish in	
	a single race in the exact order), "Pick	
14	Three" (picking the winning horse in	
15	three consecutive races), "Pick Four"	
	(picking the winning horse in four consecutive races), and a "Pick Six"	
16	(picking the winning horse in six	
17	consecutive races.)	
18	107. Defendant concedes that all of these	Midland Depo., 201:23-203:18, Docket
10	(Win, Place, Show and exotic wagers)	No. 62-5; Shutty Depo., 91:2-7; 99:23-
19	are indeed <i>wagers</i> when placed at the	100:3; 102:17-19. Docket No. 62-6.
20	racetrack.	100.3, 102.17 17. <u>Booket</u> 100. 02 0.
	108. Historically, wagering on horses	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
21	only took place live (at the actual track	1.5 1.5 11 2 1 2 1 2 1 2 1 3 1 3 2 3 1 3 1 3 1
22	where the race was being run), such that	
	bettors had to attend the race to place a	
23	wager.	
24	109. Eventually, off-track betting	Daruty Dec., ¶ 12, <u>Docket</u> No. 62-3.
25	facilities opened, which accepted wagers	<u> </u>
25	at locations other than the track where	
26	the race was being run.	
27	110. In 1978, Congress enacted the IHA,	Daruty Dec., ¶ 13, <u>Docket</u> No. 62-3.
21	which was explicitly intended to	
28	"regulate interstate commerce with	

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1	respect to wagering on horseracing." As	
2	provided therein, no one "may accept an interstate off-track wager except as	
3	provided in" the IHA.	
4	111. Defendant does not comply with the IHA.	Midland Depo., 190:16-24, <u>Docket</u> No. 62-5; Shutty Depo., 92:9-14, <u>Docket</u> No.
5		62-6.
6	112. From the late 1990's through today,	Daruty Dec., ¶ 14.
7	the industry has experienced much growth in the area of Advanced Deposit	
8	Wagering ("ADW").	
9	113. In ADW, a customer deposits funds	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
	with a licensed, regulated online/telephone wagering operator, and	
10	then issues wagering instructions (via	
11	telephone or internet) to that operator to	
12	place a wager on a specific race using funds in the account.	
13	114. If the wager is successful, the	Daruty Dec., ¶ 14, <u>Docket</u> No. 62-3.
14	winning funds are deposited directly into	
15	the customer's account.	
	115. The IHA only permits acceptance of	Daruty Dec., ¶ 16, <u>Docket</u> No. 62-3.
16	interstate wagers on horseraces by an entity (including an ADW operator),	
17	which has obtained consent from, <i>inter</i>	
18	alia, the host racing association on whose	
19	races such wagers are placed, such as	
20	Plaintiffs. 116. It is customary in the industry for a	Daruty Dec., ¶ 17, <u>Docket</u> No. 62-3.
21	host racing association to grant the	Dataty Doc., ∥ 17, <u>Dockot</u> 110. 02 3.
	required consent only if it receives a	
22	payment of money or other value from	
23	the entity accepting the wagers. 117. Defendant has never been licensed	Midland Depo., 406:21-23.
24	as an ADW.	1.11.01.01.0 D Op 0., 100.21 23.
25	118. Plaintiffs operate horse racing meets	Daruty Dec., ¶ 7, <u>Docket</u> No. 62-3.
	at race tracks in California (Santa Anita	
26	Park and Golden Gate Fields), Florida	
27	(Gulfstream Park and Gulfstream Park West), Maryland (Pimlico and Laurel	
28	Park), and Oregon (Portland Meadows).	
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1	119. Each Plaintiff is a Host Racing	Daruty Dec., ¶ 18, <u>Docket</u> No. 62-3.
2	Association within the meaning of the IHA.	
3	120. Each Plaintiff has the approval of its	Daruty Dec., ¶ 19, <u>Docket</u> No. 62-3.
4	host State to conduct racing.	, n , <u>———</u>
	121. Each Plaintiff has a written	Daruty Dec., ¶ 20, <u>Docket</u> No. 62-3.
5	agreement with its Horsemen's Group, as	
6	required by the IHA.	
7	122. No Plaintiff has ever provided	Daruty Dec., ¶ 22, <u>Docket</u> No. 62-3.
	consent to Defendant to accept a wager	
8	on a race run at any of Plaintiffs' race	
9	tracks.	Dometry Dog. ¶ 22 Dogkat No. 62 2
	123. No Plaintiff has ever provided consent to Defendant to accept a wager	Daruty Dec., ¶ 23, <u>Docket</u> No. 62-3.
10	from a resident of the States of	
11	California, Florida, Maryland or Oregon.	
12	124. No Plaintiff has ever received any	Daruty Dec., ¶ 24, <u>Docket</u> No. 62-3.
	money from Defendant with respect to	, n , <u>———</u>
13	wagers (or entry fees) accepted by	
14	Defendant	
15	125. Defendant does not have any	Daruty Dec., ¶ 25, <u>Docket</u> No. 62-3.
	agreements with any of the Plaintiffs.	
16	126. Defendant has never requested nor	Daruty Dec., ¶ 21, <u>Docket</u> No. 62-3.
17	received consent from any Plaintiff to	
10	accept wagers on races run at the Plaintiffs' race tracks.	
18	127. Defendant has never requested nor	Midland Depo., 211:24-212:7, Docket
19	received consent of any host racing	No. 62-7.
20	commission to accept wagers on	110.02 /
21	Plaintiffs' races.	
21	128. Defendant has never requested nor	Midland Depo., 212:8-11; 213:2-5,
22	received consent from any off-track	<u>Docket</u> No. 62-7.
23	racing association to conduct its contests.	
	129. In response to New York's DFS	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A;
24	legislation Derby Wars stopped accepting	Midland Depo., 353:19-354:5; 485:13-
25	entry fees from residents of New York,	25.
26	130. Every visitor to the Derby Wars	Ellis Dec. Opp. to MSJ, ¶7.
	website has access to the leaderboards, a display of other participants' selections,	
27	and a graphic that displays how many	
28	people selected each horse, without	
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paying an entry fee.	
131. The prizes offered by Defendant	Ellis Dec. Opp. to MSJ, ¶4, Exhibit B;
consist of entry fees only; Defendant has	Shutty Depo., 21:17-22.
no other source of revenue for the Derby	
Wars contests.	
132. Defendant admits that its business	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A
model is that the cash prize in a contest	Midland Depo., 149:1-5.
must be less than the cash entry fees.	
133. When a licensed ADW accepts a	Ellis Dec., ¶13, <u>Docket</u> No. 62-7.
wager from a resident of California,	
Florida, Maryland or Oregon, the host	
racing association in that state receives a	
payment as its "Market Access Fee" or	
"Source Market Fee."	
134. In October, 2011, HRL launched the	Midland Depo., 72:3-5, Docket No. 62-
DerbyWars.com website.	5.
135. Defendant admits that that it has	Ellis Dec. Opp. to MSJ, ¶3, Exhibit A,
continually operated these contests on a	Midland Depo., 124:24-125:1.
daily basis since 2011.	_

DATED: April 3, 2017 CORBETT, STEELMAN & SPECTER A Professional Law Corporation

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